

EXECUTIVE SECRETARIAT**Routing Slip**

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Executive Secretary

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DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548**FILE:** B-211737**DATE:** September 27, 1983**MATTER OF:** Central Intelligence Agency--Waiver of
Interest under Prompt Payment Act**DIGEST:** A Government contractor may waive an interest penalty payment issued to it under the Prompt Payment Act either by an express written statement or by acts and conduct which indicate an intent to waive.

By letter of May 5, 1983, the Central Intelligence Agency (CIA) requested our opinion as to the propriety of a contractor's waiver of a Government interest penalty payment under the Prompt Payment Act. Upon delay in payment of a completed contract, the CIA, in compliance with the Act, tendered the payment of interest. It did this by preparing a separate check in the proper amount to cover the interest penalty on the overdue bill. However, the contractor refused to accept the interest check and stated that it did not want or claim the interest penalty payment. The question presented is whether a Government contractor may waive the right to an interest penalty payment. If waiver is permissible, the next question is the method by which such right may be validly waived. We hold that waiver of an interest penalty payment under the Prompt Payment Act is permissible as long as the intent to waive is unmistakably clear.

The Prompt Payment Act, Pub. L. No. 97-177 (May 21, 1982), codified at 31 U.S.C. §§ 3901-3906, requires every Federal agency to pay an interest penalty on amounts owed to contractors for the acquisition of property or services when the agency fails to pay on time. The legislative history of the Act indicates that the interest penalty is a mandatory charge "that Government agencies will automatically be obligated to pay * * * without the necessity for business concerns to take action to collect

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such payments." H.R. Rep. No. 461, 97th Cong., 2d Sess. 8 (1982). Under the Act, it is clear that an agency must pay an interest penalty on all overdue bills. The implementing regulations of the Office of Management and Budget (OMB Circular No. A-125, August 19, 1982) confirm that payment is generally to be automatic.

As to whether a contractor must accept the penalty payment, the general rule is that rights granted by statute may be waived provided such waiver does not infringe on the rights of others and provided waiver of the right is not forbidden by law. See, e.g. Office & Prof. Employees International Union Local 2 v. Washington Metropolitan Area Transit Authority, 552 F. Supp. 622, 631 (D.D.C. 1982). The determination of whether a statutory right is freely waivable "depends upon the intention of Congress as manifested in the particular statute." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704, 65 S. Ct. 895, 89 L.Ed 1296 (1945).

Nowhere in the language or legislative history of the Act does it state that a contractor is forced to accept the penalty payment. While the Act was enacted largely for the benefit and protection of Government contractors, it was also designed to "stigmatize" slow-paying agencies. H.R. Rep. No. 461, supra. Since a Government agency is legally obligated to tender payment, the policy behind the Act is not precluded if the contractor voluntarily refuses to accept. Also, there is no practical way to compel the contractor to accept the money. The contractor is always free to return the money as a gift to the United States or, if the contracting agency has statutory authority to accept gifts, directly to it. Therefore, we hold that a Government contractor may legally waive his right to an interest penalty payment issued under the Prompt Payment Act.

The CIA also asks whether the contractor's act of refusal in this particular case constitutes a valid waiver. In general, waiver occurs when one evinces an intention to relinquish a known right. Matter of Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982). Inasmuch as waiver is the abandonment of a known right, the right claimed to have been waived must have been in existence at the time of the waiver. Consequently, waiver could not be accomplished prospectively by means of a contract clause because the contractor would not yet be in a position to assert the right. In this case, however, the contractor is relinquishing a present right.

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Waiver, involving as it does the notion of intention, may be either express or implied from conduct. To make out a case of implied waiver of a legal right, there must be a distinct, positive act which is inconsistent with the continued assertion of the right in question. Weisbart & Co. v. First National Bank of Dalhart, Texas, 568 F.2d 391, 396 (5th Cir. 1978). We hold, therefore, that a contractor may waive his right to a penalty payment either by an express, written statement, or by acts and conduct which indicate an intent to waive. In this case, by refusing to accept the check, the contractor has pursued such a course of conduct as to evidence an intention to waive his right to the penalty payment, and his conduct therefore constitutes a valid waiver.

Where waiver is implied, the acts or conduct relied upon to show waiver must make out a clear case. Matter of Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982). Furthermore, the party alleging that waiver has occurred has the burden of proof to set forth the circumstances which establish the waiver. Robinette v. Griffith, 483 F. Supp. 28, 35 (W.D. Va. 1979). Certainly, an express written statement from the contractor is the clearest evidence of waiver. Absent such a statement, the agency should document the conduct establishing the waiver. If waiver is to be implied from the contractor's conduct, the conduct

"should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible." Buffum v. Chase National Bank, 192 F.2d 58, 61 (7th Cir. 1951).

Thus, if the contractor does not return the penalty check, but simply never cashes or deposits it, waiver should not be implied because a Treasury check is payable without limitation of time. 1/ 31 U.S.C. § 3328(a)(1) (formerly 31 U.S.C. § 132(a)).

1/ This of course would not be a problem in the presumably more common situation where an agency includes both principal and interest in a single check. On the assumption that a contractor is unlikely to return the entire check just to waive the interest, the contractor would have to negotiate the check and then take the affirmative step of writing its own check and returning it, presumably with a written statement that it is waiving the interest.

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In view of the foregoing, we conclude that the contractor's waiver in this case is permissible and valid.

for Shilton J. Jordan
Comptroller General
of the United States